

United States 10
Circuit Court of Appeals -
For the Ninth Circuit.

THE CITY OF FORSYTH, a municipal corporation of The State of Montana and FAIRBANKS, MORSE & COMPANY, a corporation,

Appellants,

vs.

MOUNTAIN STATES POWER COMPANY, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United
States for the District of Montana
Billings Division

FILED

JAN 10 1942

PAUL P. O'BRIEN,

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States in and for
the District of Montana.

Billings Division
No. 183.

Mountain States Power Company,
Plaintiff,
vs.

City of Forsyth, and Fairbanks, Morse & Co.,
Defendants.

Be it remembered, that on May 27, 1940, a Complaint was duly filed herein, which is in the words and figures following, towit: [2]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
for the District of Montana

Billings Division

MOUNTAIN STATES POWER COMPANY,
Plaintiff,

vs.

CITY OF FORSYTH and FAIRBANKS, MORSE
& CO.,

Defendants.

COMPLAINT

Plaintiff complains of the defendants and alleges:

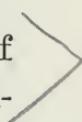
I.

Plaintiff is a corporation, incorporated under the laws of the State of Delaware.

The City of Forsyth, is a municipal corporation, organized and existing under and by virtue of the laws of the State of Montana.

The defendant Fairbanks, Morse & Co. is a corporation, incorporated under the laws of the State of Illinois; has qualified to do business as a foreign corporation in the State of Montana and, in doing so, had filed in the office of the Secretary of State of Montana a certificate certifying that it has consented to be sued in the courts of Montana upon all causes of action arising against it in this state, and that service of process may be made upon a person named in said certificate, a citizen of the State of

Montana and whose place of residence is stated and designated in said certificate, and further certifying that such service when so made upon such agent shall be valid service on said defendant.

The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3000.00). 

II.

Plaintiff is and has been for several years the owner of an electric light and power plant or system in the City of Forsyth, State of Montana, [3] consisting of part of poles and wires in the streets and alleys of said city, and engaged in furnishing electric light and power to said city and the people of said city at rates prescribed by the Public Service Commission of Montana, which said electric light and power plant or system was constructed by the predecessor in interest and ownership of this plaintiff.

III.

The defendant City of Forsyth caused to be published in the Forsyth Independent, a newspaper published in said City, on the 18th day of April, 1940, a notice, a copy of which is hereto attached, marked Exhibit "A", and made a part hereof. In and by the specifications referred to in said notice and on file with the City Clerk, it was provided that:

"The agreement which the bidders agree to enter into will be in the form attached to these specifications. The agreement, specifications,

the drawings and the bid and acceptance constitute the contract documents.”

A copy of the form of agreement is attached hereto, marked Exhibit “B”, and made a part hereof.

IV.

In and by said specifications it is provided as follows:

“Conditional Acceptance of Bids

All bids will be received and any bid accepted will be accepted subject to the result of an election which will be called by the City Council and held as soon as practical after the acceptance of the bid, but no bid shall be final or binding on the City unless and until approved by the resident taxpayers at an election called at which said proposed contract will be submitted.

At this election there will be submitted to the resident taxpayers of the City to be by them voted upon at said election the question of approving or disapproving said proposed letting.

If the result of said election be that the resident taxpayers approve said letting at said election, then and in that event, a formal contract will be entered into with the successful bidder; but if the result of said election should be that the resident taxpayers did not approve said letting, then, and in that event, the acceptance of the bid of the successful bidder shall be

ipso facto null and void, shall be of no binding force and effect on either party, and neither party shall be liable for damages thereunder. If the validity of the said contract should be questioned by a suit in court and upon final court determination said contract shall be held illegal and void, then neither party shall be liable for damages thereunder.” [4]

“Completion

The contractor will not be required to begin work until ten days after litigation for the ousting of the power company now serving the city from its streets has been finally determined in favor of the city. The work shall be completed within 180 days after commencement.”

“Removal of Competition

The City undertakes to promptly institute such legal action or proceeding it may deem proper or advisable to have it declared by a judgment of a court of competent jurisdiction that the public Service Corporation now serving the City and its inhabitants has no right to use or occupy the streets, alleys or public grounds of the City with its poles, wires, or other instrumentalities, and that it be required to remove all of its equipment therefrom when the proposed plant of the City is ready for

production and distribution of electricity so that the City shall be free of its competition."

"Title to Plant.

The title to the entire plant including the said site and distribution system shall remain in the Contractor until the entire purchase price is paid with interest. When such price is paid, the Contractor shall convey the site hereinbefore described together with the power house constructed thereon, and all appurte- nances thereto to the Owner, and will convey to the Owner the same title which the Contractor has acquired from the Owner, the said conveyance to be made free from any encum- brances, subsequent to the Owner's conveyance, and the City shall become the owner of the re- mainder of the entire plant by operation of law. If any further conveyance is requested by the Owner, it shall be made by the Contractor.

The entire plant, including distribution sys- tem and power house building howsoever parts thereof shall be installed or attached to the realty shall at all times until fully paid for, be and remain the personal property of the Con- tractor, and is to be conveyed in its entirety to the Owner when the entire contract price has been paid."

"Method of Payment.

Payment of the contract let under these spe- cifications shall be made solely out of the net

earnings of the light and power plant to be established hereunder. The net earnings are those which remain after deducting the cost of maintaining and operating the plant, including distribution system and power house. Such costs are the costs of labor, insurance, taxes, if any, fuel oil, lubricating oil, repairs, supplies, replacing parts, and all other necessary and legitimate expenses of maintaining and operating the said plant. The said net earnings shall be pledged to an extent sufficient to make the payments on the contract let under these specifications, with interest, as the same become due. Any earnings in excess of the amount required to make the payments of principal and interest on the contract as they shall become due shall be used only for the following purposes, at the discretion of the owner, namely:

(a) To pay for extensions and additions to the plant equipment and distribution system, and such additions and extensions shall be used in the operation of the plant equipment and distribution system, and the earnings therefrom shall be paid into the Light and Power Plant Fund herein provided for.

(b) To anticipate payments of principal and interest on the contract. [5]

It is to be expressly understood that the City does not guarantee to pay the contract price absolutely and at all events, and the said price shall in no event be or become a general obli-

gation of the city, or create any indebtedness against it, or be payable out of taxes or out of its general revenues, but payment therefor will be made solely out of the net earnings of the plant, and not otherwise.

The bidder shall specify in his bid the total amount thereof, the rate of interest on the deferred payments which shall not exceed five per cent per annum.

The contract let under these specifications shall be paid out of the net earnings of the Municipal Light, Heat and Power Plant as herein provided in monthly installments as follows: \$1250.00 Dollars on the first day of the sixth month after commencement of operation of the plant, and a like sum on the first day of each and every month thereafter until one-half of the contract price is paid, and \$1500.00 Dollars on the first day of each and every month thereafter until said contract price is paid in full. The unpaid balance of the contract price shall bear interest from the date of commencement of operation of the generating equipment, at the rate specified by the successful bidder in his bid, not exceeding, however, five per cent per annum, payable semi-annually out of the net earnings of said plant."

“Default—Notice

No default shall exist or be declared under the contract to be entered into hereunder, nor shall the contractor be entitled to take posses-

sion of the plant or any part thereof unless and until there has been a default at one and the same time in six of the monthly installments of payment required to be made by the owner under the contract to be let hereunder, or unless and until a default in two semi-annual installments of interest, and in any event not until the contractor has given six months written notice, duly served upon the owner, of his intention to declare a default to exist, and no cancellation of the contract entitling the contractor to take possession shall be declared prior to the expiration of the time specified in the notice of contractor's intention to declare a default as above provided."

“Revenue Certificates

All deferred payments will be evidenced by certificates executed by and in the name of the City, representing payments to be made under the contract. Said certificates, however, are not to be considered as an additional, separate or independent obligation, apart from the contract, but merely a convenient way of evidencing the payments to be made under the contract, and the times of such payments.”

“Rates

It is to be expressly understood that in no event shall the schedule of residential, commercial, power, lighting, heating, cooking, street

lighting, pumping or any other rates be increased over and above the following rates during the life of the contract.

Residential

First	10 KWH	for \$1.00	(Min)
Next	20 KWH	for	7¢
Next	55 KWH	@	4¢
Excess	KWH	@	3¢
Minimum		\$1.00	[6]

Commercial

First	10 KWH	for \$1.00	(Min)
Next	90 KWH	at	7¢
Next	200 KWH	at	6¢
Next	200 KWH	at	5¢
Next	500 KWH	at	4¢
Excess	KWH	at	3.5¢
Minimum		\$1.00	

Heat

First	20 KWH	for \$1.00	
Next	180 KWH	at	3.5¢
Excess	KWH	at	3¢
Minimum		\$1.00	

Power

First	200 KWH	at	6¢
Next	200 KWH	at	5.5¢
Next	200 KWH	at	5¢
Next	200 KWH	at	4.5¢
Next	2200 KWH	at	3¢
Excess	KWH	at	2¢
Minimum		\$1.00	per HP

Customers monthly bill will be computed at the net rate, and there will be added to the total net bill a sum equal to 10% thereof, which will be collected from customers who fail to pay the net bill within ten days after date of bill.

Street Lighting:

Burning dusk to dawn per month—\$190.00

Water Heating:

Off peak water heating 1¢ per KWH Min.

Bill—\$1.00

Pumping:

All at \$.03

This rate shall apply to the City Water Plant and to the Sewage Disposal Plant. At the option of the City Water Department, they may elect to use the Power rate above.”

“Labor

All skilled and common labor for this project shall be secured in the City of Forsyth so long as competent supply is available.”

“Contractor Not Required to Commence Performance While Litigation Is Pending.

If any litigation should be instituted questioning the validity of the contract to be let hereunder; or questioning the authority of the Owner to make such contract, or questioning in any way the validity of the proceedings of the Owner, or its Council, relative to the establishment of a power plant, or relative to the letting

of this contract, the Contractor shall not be required to proceed with the performance thereof until such litigation is finally determined in favor of Owner.” [7]

“General:

The proposed system shall be built on the streets and alleys of the City of Forsyth, Montana, across railroad rights of way, and on private property. The City of Forsyth will furnish all rights of way and obtain permission for the contractor to carry out his work on private property.”

V.

Pursuant to said notice to bidders made a part hereof as Exhibit “A”, the defendant Fairbanks, Morse & Co. presented and filed a bid in the sum of \$169,969.00, payable in monthly installments as provided in said specifications, with interest on deferred installments at the rate of 5% per annum, and thereafter, and on the 30th day of April, 1940, the City Council of said City accepted said bid, subject to the approval of the taxpaying electors of said City.

VI.

At an election held in the said City of Forsyth on the 25th day of May, 1940, there was submitted to the registered tax-paying electors the following question, to-wit:

“Shall the proposed contract between the City of Forsyth, Montana, and Fairbanks, Morse & Co., for furnishing and constructing

a complete municipal electric light, heat and power plant in and for said city, for the sum of \$169,969.00 payable in monthly installments, with interest at the rate of five per cent, per annum, solely out of the net earnings of such plant, in accordance with the plans and specifications and bid of said Fairbanks, Morse & Co., all of which are on file in the office of the city clerk, be approved?"

At said election a majority of the voters voted for the approval of said proposed contract.

VII.

The City is without power of authority to make or enter into said proposed contract and if said contract is entered into and said plant or system is constructed, as provided in said contract, the said City will become a competitor of plaintiff and take from plaintiff many of its customers and patrons, to its great and irreparable damage and injury.

VIII.

The City, in making and entering into said contract, is assuming to exercise power and authority conferred by Chapter 115 of the Laws [8] of Montana of 1937, as amended by Chapter 111 of the laws of Montana of 1939. The emergency mentioned in chapter 115, as amended, has ceased to exist and there is not now and has not been since long prior to the month of April, 1940, such a condition or situation as is described and recited there-

in as the reason or ground for the enactment of same, and said chapter, as amended, is not now and has not been since long prior to the month of April, 1940, of any force or effect. That if said emergency now exists, said chapter 115, as amended, does not confer any power or authority on the defendant City to make or enter into said proposed contract.

IX.

Chapter 115, as amended, is unconstitutional and void in that by Section 4 thereof, whether or not the emergency mentioned has ended is to be determined by the opinion of the Governor, whereas said question is a judicial question for determination by the Courts.

X.

Plaintiff has a franchise, by virtue of section 6645 of the Revised Codes of Montana of 1935, to occupy the streets, alleys and public grounds of said city with its poles and wires and the right to furnish electric light and power to said city and the inhabitants thereof, as it is now doing, and the action of said City in advertising for bids, holding said election and proposing to enter into said contract casts a cloud upon the title of this plaintiff to said franchise and right to furnish electric light and power, as aforesaid.

XI.

Said contract is void for want of mutuality in that in and by said contract it is optional with the

defendant, Fairbanks, Morse & Co. to proceed or not to proceed with the construction of said electric plant or system.

XII.

The provision of said contract with reference to rates is void and unenforceable in that the rates to be charged for light, heat and power furnished by or through such a plant or system must be fixed and prescribed by the Public Service Commission of Montana, which was well known to both of said defendants. That by agreeing that the rates should never be in excess of those provided in said contract the said defendants perpetrated a fraud upon the elec- [9] tors who voted at said election, and, if said electors had been informed that said rates may be increased at any time, many of said voters who approved of said contract at said election would have voted against said approval, the number of which are unknown to plaintiff, but plaintiff alleges that, except for said fraud, said proposed contract would not have been approved at said election.

XIII.

The plans and specifications for said plant or system were prepared by or under the direction or supervision of the defendant, Fairbanks, Morse & Co. and were so prepared as to prevent any competition in the bidding for the construction of said plant or system, in consequence of which the only bid presented was the bid of the said defendant Fairbanks, Morse & Co., as was intended by said defendant and the said City.

XIV.

That the plaintiff is and has been for several years a large taxpayer upon both real and personal property in said city.

XV.

That the plaintiff has no plain, speedy or adequate remedy in the ordinary course of the law.

Wherefore, plaintiff prays judgment:

1. That the plaintiff be granted a preliminary injunction enjoining the defendant City from removing the poles and wires of this plaintiff from the streets and alleys of said City or from in any manner interfering with the plant or system of this plaintiff, or the operation of same, and that the said defendants be enjoined from entering into said proposed contract, or, if said contract has been entered into, that said Fairbanks, Morse & Co. be enjoined from constructing such plant or system in accordance with said plans or specifications, or otherwise, and, upon final hearing, said injunction be made permanent.

2. For such other and general relief as plaintiff may be entitled to.

TOOMEY, McFARLAND & CHAPMAN,
GUNN, RASCH, HALL & GUNN,

By M. S. GUNN [10]

A member of said Firm

Residence and Postoffice Address;

Helena, Montana.

Attorneys for Plaintiff [11]

EXHIBIT "A"

NOTICE TO BIDDERS

Notice is hereby given that the City Council of the City of Forsyth, Montana, will, at a meeting to be held on the 25th day of April, 1940, at the hour of two o'clock p. m., receive and publicly open and consider bids for the furnishing and providing of all materials and labor, skill, machinery, tools and equipment of every kind and nature necessary to construct, and to construct, a complete light, heat and power plant for operation in and for said City, including generating machinery, equipment and auxiliaries, distribution system, power house, meters, house connections and site for the power house building, more particularly described in the specifications, all in accordance with the plans and specifications therefor on file with the City Clerk.

Plans may be examined in the office of the City Engineer, or may be had for a deposit of \$10, which deposit will be refunded to bidders upon the return of the plans and specifications in good condition.

Bidders are required to submit a lump sum bid for the entire plant as above specified and bids on individual parts or portions thereof will not be considered.

The successful bidder will be required to purchase the site as provided for in the specifications, at the price therein stated.

All bids must be under seal, must be directed to City Council of the City of Forsyth, must be accompanied with a certified check for five per cent, of

the amount of the bid, payable to the City, and must be deposited with the City Clerk not later than two o'clock P. M. on the 25th day of April, 1940. The said check will be forfeited to the City as liquidated damages in case the bidder whose bid has been accepted fails or refuses to enter into the proposed contract and give the bond for the performance of said contract required by Section 5668.41 of the revised codes of Montana, 1935, and all laws amendatory and supplemental thereto and conditioned as required by the specifications.

Payment of the Contract will be made solely out of the net earnings of the plant. Each bidder is required to include the price of the site and the rate of interest which he is willing to accept on the deferred payments not exceeding five per cent. per annum.

All bids will be received and any bid will be accepted subject to the approval of the resident tax payers of the City at an election at which the proposed contract will be submitted. If the acceptance of the bid and the proposed contract be approved by the resident tax payers, then a formal contract will be executed with the successful bidder. If the acceptance of the bids be disapproved, then the acceptance will be null and void.

The City reserves the right to reject any and all bids.

By order of the City Council,

By H. V. BEEMAN,
City Clerk. [12]

EXHIBIT "B"
FORM OF CONTRACT

The following shall be substantially the form of contract to be entered into between the City and the successful bidder:

This Agreement, Made and entered into this day of, 19...., by and between the City of Forsyth, Montana, as party of the first part, hereinafter called the City, and as party of the second part, hereinafter called the Contractor, Witnesseth:

(1) That the Contractor, in consideration of the covenants and agreements of the City hereinafter contained to be kept and performed by it, hereby agrees to:

Furnish and provide all material, labor, skill, machinery, tools and equipment of every kind and nature necessary to construct, and to construct, a complete light, heat and power plant ready for operation in and for the city including generating machinery and equipment, distribution system, power house, meters, house connections from distribution system, and the site for the power building described in the specifications, all in accordance with the plans and specifications, the bid or proposal of the Contractor, and its acceptance by the Council for the sum of Dollars, which plans, specifications, bid and acceptance thereof are hereby attached, marked Exhibits "A" to "D"

inclusive, respectively, and hereby made a part hereof.

(2) The Contractor agrees to purchase the site provided for in the specifications at the price therein stated, and to construct the power house thereon.

(3) The Contractor agrees to accept payment for the plant out of the net earnings thereof exclusively, as provided in the specifications; and agrees to start and complete the said plant within the time limited in said specifications, except that in case of litigation the contractor shall not be required to commence performance until such litigation is finally determined. The Contractor further agrees to accept payment for the plant in the instalments and at the times stated in these specifications with interest at the rate stated in said bid, payable semi-annually.

(4) In accordance with specifications the Contractor reserves title to the entire plant until it is fully paid for, with interest, and upon such payment being made will convey same to the City. The City when plant is completed, and accepted shall be entitled to take immediate possession thereof, and to operate same.

(5) The City hereby hires and employs the said Contractor to supply all material, labor, skill, tools, machinery, equipment, instrumentalities and work of every kind and nature, provided for or specified in paragraph One (1) hereof, necessary to construct and to construct, a complete light, heat and power plant ready for operation in and for said City, in-

cluding generating machinery and equipment, distribution system, power house, meters, house connections and distribution system, and site for power house, all in accordance with the plans and specifications therefor, and upon the site designated in the specifications, for the sum of Dollars, to be paid out of the net earnings of the plant as provided in the specifications, and not otherwise.

In Witness Whereof, The parties hereto have hereunto caused their corporate names to be subscribed by their duly authorized officers or [13] agents, each the day and year first above written.

CITY OF FORSYTH,

By

Mayor

And

City Clerk

.....
By

Its Duly Authorized Agent

[Endorsed]: Filed May 27, 1940. [14]

Thereafter, on August 9, 1940, an Answer of Defendant City of Forsyth, was duly filed herein, being in the words and figures following, towit: [23]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT CITY OF FORSYTH, A MUNICIPAL CORPORATION.

Now comes the City of Forsyth, a municipal corporation, one of the defendants in the above entitled action and for its answer to the Complaint of the plaintiff in said action, admits:

(1) That the City of Forsyth is a municipal corporation, organized and existing under the laws of the State of Montana;

(2) That plaintiff is and has been for several years the owner of an electric light and power plant in the City of Forsyth, Montana, consisting in part of poles and wires in the streets and alleys of said city, and has been for several years engaged in furnishing electric light and power to said city and its inhabitants.

(3) That the defendant, city of Forsyth, caused to be published in the Forsyth Independent, a newspaper published in said city, on the 18th day of April, 1940, a Notice, of which Exhibit A attached to the complaint is a correct copy; that in and by the specifications referred to in said Notice and on file with the city clerk, the provision quoted in paragraph III of the complaint was set out; that Exhibit B attached to the complaint is a copy of the form of agreement referred to in paragraph III.

(4) That the provisions quoted in paragraph IV of the complaint were and are contained in the specifications referred to.

(5) That the defendant Fairbanks, Morse & Company, presented and filed with the defendant city, a bid in the sum of One Hundred Sixty-nine Thousand, Nine Hundred Sixty-nine (\$169,969.00) Dollars, payable in monthly installments, as provided for in the specifications, with interest on deferred [24] installments at the rate of five per cent per annum, and admits that on the 30th day of April, 1940, the City Council of the defendant city accepted said bid, subject to the approval of the taxpaying electors of said city.

(6) That at an election held in said city on the 25th day of May, 1940, there was submitted to the registered taxpaying electors of said city, the question quoted in paragraph VI of the complaint, and that at said election a majority of the taxpaying electors voted for the approval of said proposed contract.

(7) Except as hereinabove expressly admitted, this defendant denies each and every allegation of the said complaint.

(8) Further answering, this defendant alleges that the said city of Forsyth in making and entering into the said contract is proceeding under authority conferred upon it by the decisions of the Supreme Court and statutes of the State of Montana, including the statutes referred to in paragraph VIII of the complaint, and claims and alleges that under said laws and statutes it has full power and authority to enter into said contract, and to establish a municipal light, heat and power plant in and for said city.

(9) Further answering, this defendant alleges that heretofore, to-wit, on or about the tenth day of September, 1904, one, John E. Edwards, made application to the town Council of the town of Forsyth, Montana, for a franchise to construct and maintain an electric light plant in the town of Forsyth, for the purpose of supplying said town and the people thereof with electric light for public and private use; that thereafter, and on or about the 15th day of October, 1904, Ordinance numbered 32, entitled "An Ordinance to Grant to John E. Edwards, his heirs, executors, administrators and assigns the privilege of Constructing, Maintaining and Operating an electric light plant in the town of Forsyth, State of Montana, and to permit them to use the streets and alleys of said town in connection therewith," was duly passed by the said town Council; that in and by said Ordinance it was provided that a franchise was granted to the said John E. Edwards for the purpose aforesaid, for a period of twenty years from and after the time the said ordinance took effect; that thereafter, the said ordinance was duly submitted to the resident free-holders and taxpayers of said town, for rejection or approval, at an election which was duly called and held on the 30th day of September, 1904, and [25] that at said election the said ordinance was approved; that the defendant, city of Forsyth, is the successor of the said town of Forsyth; that the plaintiff herein is the assignee of the said John E. Edwards, or of an assignee or assignees of the said

John E. Edwards, and derives its right to occupy the streets and alleys of the said city of Forsyth from the said ordinance No. 32, and not otherwise; that the right to occupy said streets and alleys under said ordinance has long since expired, and that the plaintiff herein is and at the time of the commencement of this action was occupying said streets and alleys of said city solely during the will and pleasure of the said defendant, city of Forsyth; that a true and correct copy of said ordinance No. 32 is hereto attached, marked Exhibit A, and hereby made a part hereof.

(10) Further answering, this defendant alleges that heretofore, to-wit, on the 26th day of September, 1905, the said John E. Edwards, the grantee under said ordinance No. 32, duly organized a corporation under the name of the Forsyth Electric Light & Power Company for the purpose of generating and furnishing electric light and power for public and private use in the said town of Forsyth, Montana; that the term for which said corporation was organized to exist was twenty years from and after the date of incorporation, which was the 26th day of September, 1905; that thereafter, and on or about the third day of January, 1921, the said Forsyth Electric Light & Power Company changed its name to the Forsyth Light & Power Company; that the said corporation was and is the assignor and the plaintiff herein, and the corporation from which it acquired the rights that it claims to have in the

streets and alleys of the city of Forsyth; that at the time of the attempted transfer of the said franchise to the plaintiff, herein, the assignor thereof had no rights to transfer, and the plaintiff herein acquired no rights by virtue of any transfer or assignment from the said John E. Edwards, or any of his assignees.

Wherefore, This defendant prays that the plaintiff be denied any relief herein, and that the said action be dismissed, with costs against the said plaintiff.

F. F. HAYNES

Attorney for the Defendant,
City of Forsyth,
Post Office Address,
Box 676, Forsyth, Montana.

[Endorsed]: Filed Aug. 9, 1940. C. R. Garlow,
Clerk. [26]

EXHIBIT A

Ordinance No. 32

An ordinance to Grant to John E. Edwards, his heirs, executors, administrators and assigns, privilege of constructing, maintaining and operating an electric light plant in the Town of Forsyth, State of Montana, and to permit them to use the streets and alleys of said Town in connection therewith.

Be it Ordained by the Town Council of the Town of Forsyth.

Section I: That there is hereby granted to John E. Edwards, his heirs, executors, administrators, or assigns, the privilege and right of maintaining, constructing and operating an electric light plant in the Town of Forsyth, State of Montana, for the purpose of supplying said Town and the people thereof with electric lights, for public and private uses, for hire, tolls, and otherwise.

Section II: The privilege and right of using the streets and alleys of the Town of Forsyth, State of Montana, as they now are, or as they may be hereafter established, for the purpose of erecting and maintaining electric light poles and stringing electric light wires, on said poles, which said privilege shall continue for a period of twenty years, from and after the time this Ordinance takes effect.

Section III: The privilege and right of making excavations in the streets and alleys of the said Town of Forsyth, State of Montana, as they now are, or as they may be hereafter established, for the purpose of erecting and maintaining electric light poles therein.

Section IV: That after the passage, approval and publication of this Ordinance, the said John E. Edwards shall file a written acceptance thereof, for himself, his heirs, executors, administrators, and assigns, with the Town Clerk of the said Town of Forsyth.

Section V: That this Ordinance shall take effect and be in full force upon its passage, approval and publication, and acceptance.

Approved this 15th day of October, 1904.

CHAS. B. TABER

Mayor

Attest:

C. W. BAILEY

Clerk

Corporation Seal [27]

EXHIBIT VERIFICATION

State of Montana,
County of Rosebud—ss.

C. H. Burley, being first duly sworn on oath, deposes and says: That he is the duly elected Mayor of Forsyth, Montana, one of the Defendants named in the foregoing answer; that he has read the foregoing answer and the matters and things therein contained are true to his own knowledge; that he is duly authorized by the City Council of the City of Forsyth, Montana, by proper proceedings in his official capacity to execute this verification.

C. H. BURLEY

Subscribed and sworn to before me this 8th day of August, 1940.

F. F. HAYNES

Notary Public for the State of Montana, Residing
at Forsyth, Montana.

My commission expires June 16, 1942.

Filed Aug. 9, 1940. C. R. Garlow, Clerk. [28]

Thereafter, on August 16, 1940, an Answer of Defendant Fairbanks, Morse & Company, was duly filed herein, in the words and figures following, to-wit: [29]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT FAIRBANKS,
MORSE & COMPANY.

Now comes Fairbanks, Morse & Company, one of the defendants in the above entitled action, and for its answer to the Complaint of the plaintiff in said action, admits:

(1) That plaintiff is a corporation organized under the laws of the State of Delaware; that the city of Forsyth is a municipal corporation, organized and existing under the laws of the State of Montana; that the defendant, Fairbanks, Morse & Company, is a corporation organized under the laws of the State of Illinois; that it has qualified to do business as a foreign corporation in the State of Montana, and has complied with the laws of the State of Montana with respect to foreign corporations doing business in the state.

(2) That plaintiff is and has been for several years the owner of an electric light and power plant in the city of Forsyth, Montana, consisting in part of poles and wires in the streets and alleys of said city, and has been for several years engaged in furnishing electric light and power to said city and its inhabitants.

(3) That the defendant, city of Forsyth, caused to be published in the Forsyth Independent, a newspaper published in said city, on the 18th day of April, 1940, a Notice, of which Exhibit A attached to the complaint is a correct copy; that in and by the specifications referred to in said Notice and on file with the city clerk, the provision quoted in paragraph III of the complaint was set out; that Exhibit B attached to the complaint is a copy of the form of agreement referred to in paragraph III. [30]

(4) That the provisions quoted in paragraph IV of the complaint were and are contained in the specifications referred to.

(5) That the defendant, Fairbanks, Morse & Company, presented and filed with the defendant city, a bid in the sum of One Hundred Sixty-nine Thousand, Nine Hundred Sixty-nine (\$169,969.00) Dollars, payable in monthly installments, as provided for in the specifications, with interest on deferred installments at the rate of five per cent. per annum, and admits that on the 30th day of April, 1940, the City Council of the defendant city accepted said bid, subject to the approval of the taxpaying electors of said city.

(6) That at an election held in said city on the 25th day of May, 1940, there was submitted to the registered taxpaying electors of said city, the question quoted in paragraph VI of the complaint, and that at said election a majority of the taxpaying electors voted for the approval of said proposed contract.

(7) Except as hereinabove expressly admitted, this defendant denies each and every allegation of the said complaint.

(8) Further answering, this defendant alleges that the said city of Forsyth in making and entering into the said contract is proceeding under authority conferred upon it by the decisions of the Supreme Court and statutes of the state of Montana, including the statutes referred to in paragraph VIII of the complaint, and claims and alleges that under said laws and statutes it has full power and authority to enter into said contract, and to establish a municipal light, heat and power plant in and for said city.

(9) Further answering, this defendant alleges that heretofore, to-wit, on or about the tenth day of September, 1904, one John E. Edwards, made application to the town Council of the town of Forsyth, Montana, for a franchise to construct and maintain an electric light plant in the town of Forsyth, for the purpose of supplying said town and the people thereof with electric light for public and private use; that thereafter, and on or about the 15th day of October, 1904, Ordinance numbered 32, entitled "An Ordinance to Grant to John E. Edwards, his heirs, executors, administrators and assigns the privilege of Constructing, Maintaining and Operating an electric light [31] plant in the town of Forsyth, State of Montana, and to permit them to use the streets and alleys of said town in connection therewith," was duly passed by the said town Council; that in and by said Ordinance it was

provided that a franchise was granted to the said John E. Edwards for the purpose aforesaid, for a period of twenty years from and after the time the said ordinance took effect; that thereafter, the said ordinance was duly submitted to the resident free-holders and taxpayers of said town, for rejection or approval, at an election which was duly called and held on the 30th day of September, 1904, and that at said election the said ordinance was approved; that the defendant, city of Forsyth, is the successor of the said town of Forsyth; that the plaintiff herein is the assignee of the said John E. Edwards, or of an assignee or assignees of the said John E. Edwards, and derives its right to occupy the streets and alleys of the said city of Forsyth from the said ordinance No. 32, and not otherwise; that the right to occupy said streets and alleys under said ordinance has long since expired, and that the plaintiff herein is and at the time of the commencement of this action was occupying said streets and alleys of said city solely during the will and pleasure of the said defendant, city of Forsyth; that a true and correct copy of said ordinance No. 32 is hereto attached, marked Exhibit A, and hereby made a part hereof.

(10) Further answering, this defendant alleges that heretofore, to-wit, on the 26th day of September, 1905, the said John E. Edwards, the grantee under said ordinance No. 32, duly organized a corporation under the name of the Forsyth Electric Light & Power Company for the purpose of generating and furnishing electric light and power for

public and private use in the said town of Forsyth, Montana; that the term for which said corporation was organized to exist was twenty years from and after the date of incorporation, which was the 26th day of September, 1905; that thereafter, and on or about the third day of January, 1921, the said Forsyth Electric Light & Power Company changed its name to the Forsyth Light & Power Company; that the said corporation was and is the assignor and the plaintiff herein, and the corporation from which it acquired the rights that it claims to have in the streets and alleys of the city of Forsyth; that at the time of the attempted transfer of the said franchise to the plaintiff, herein, the assignor thereof had no rights to transfer, and the plain- [32] tiff herein acquired no rights by virtue of any transfer or assignment from the said John E. Edwards, or any of his assignees.

Wherefore, this defendant prays that the plaintiff be denied any relief herein, and that the said action be dismissed, with costs against the said plaintiff.

KYLE & KYLE

By JOHN P. KYLE

A Member of said Firm,

Residence: St. Paul, Minnesota,

Post Office: 618 Guardian
Bldg., St. Paul, Minn.

Attorneys for Defendant,
Fairbanks, Morse & Co.

EXHIBIT A

Ordinance No. 32

An Ordinance to Grant to John E. Edwards, his heirs, executors, administrators and assigns, privilege of constructing, maintaining and operating an electric light plant in the Town of Forsyth, State of Montana, and to permit them to use the streets and alleys of said Town in connection therewith.

Be it Ordained by the Town Council of the Town of Forsyth.

Section I: That there is hereby granted to John E. Edwards, his heirs, executors, administrators, or assigns, the privilege and right of maintaining, constructing and operating an electric light plant in the Town of Forsyth, State of Montana, for the purpose of supplying said Town and the people thereof with electric lights, for public and private uses, for hire, tools, and otherwise.

Section II. The privilege and right of using the streets and alleys of the Town of Forsyth, State of Montana, as they now are, or as they may be hereafter established, for the purpose of erecting and maintaining electric light poles and stringing electric light wires, on said poles, which said privilege shall continue for a period of twenty years, from and after the time this Ordinance takes effect.

Section III: The privilege and right of making excavations in the streets and alleys of the said Town of Forsyth, State of Montana, as they now are, or as they may be hereafter established, for the

purpose of erecting and maintaining electric light poles therein.

Section IV: That after the passage, approval and publication of this Ordinance, the said John E. Edwards shall file a written acceptance thereof, for himself, his heirs, executors, administrators, and assigns, with the Town Clerk of the said Town of Forsyth.

Section V: That this Ordinance shall take effect and be in full force upon its passage, approval and publication, and acceptance.

Approved this 15th day of October, 1904.

CHAS. B. TABER

Mayor

Attest:

C. W. BAILEY

Clerk

Corporation Seal [34]

State of Minnesota,
County of Ramsey—ss.

Esther P. McEvoy, being first duly sworn, on oath deposes, and says:

That heretofore, to-wit, on the sixth day of August, 1940, at the city of St. Paul, Minnesota, she served the attached Answer of Fairbanks, Morse & Company upon Gunn, Rasch, Hall & Gunn, attorneys for the plaintiff therein named, by then and there depositing in the Post Office in the city of St.

Paul enclosed in a sealed envelope, with postage thereon prepaid, the attached answer, addressed to the said attorneys as follows:

“Gunn, Rasch, Hall & Gunn,
Attorneys at Law,
Helena, Montana.”

ESTHER P. McEVOY

Subscribed and sworn to before me this 12th day of August, 1940.

(Seal) JOHN P. KYLE
Notary Public, Ramsey County, Minn.
My Commission expires April 9, 1944.

[Endorsed]: Filed Aug. 16, 1940. C. R. Garlow,
Clerk. [35]

Thereafter, on June 18, 1940,

AFFIDAVIT AND DEMAND FOR BILL OF
PARTICULARS

was duly filed herein, being the words and figures following, towit: [36]

[Title of District Court and Cause.]

State of Minnesota,
County of Ramsey—ss.

John P. Kyle, being first duly sworn, on oath deposes, and says:

That he is a member of the law firm of Kyle & Kyle, who are attorneys for the defendant, Fairbanks, Morse & Co. in the above entitled action, and

who will represent them in the preparation for trial and in the trial of said action; that paragraph XIII of the complaint herein in the following words, to-wit:

“The plans and specifications for said plant or system were prepared by or under the direction or supervision of the defendant, Fairbanks, Morse & Co. and were so prepared as to prevent any competition in the bidding for the construction of said plant or system * * *,”

is so indefinite and uncertain as not to inform this defendant of the precise part or parts of the said specifications which it is intended to be claimed “were so prepared as to prevent competition in the bidding for the construction of said plant or system”; that the plans and specifications for said plant are of a voluminous character, the General Conditions thereof consisting of sixteen typewritten pages, besides elaborate descriptions of the mechanical and structural parts of the proposed plant; that neither affiant nor the firm to which affiant belongs, is able to properly prepare said case for trial or to meet the proofs that may be offered by the plaintiff upon said trial, unless the defendant or its attorneys be informed of the precise part or parts of the said specifications which the plaintiff intends to claim were so prepared as to prevent any competition [37] in the bidding for the construction of said plant or system.

Wherefore, Affiant prays that the said plaintiff

be required to specify and set out the particular part or parts of the said plans and specifications which the said plaintiff intends to claim were so prepared as to prevent any competition in the bidding for the construction of said plant.

JOHN P. KYLE

Subscribed and sworn to before me this 14th day of June, 1940.

(Notarial Seal) ESTHER P. McEVOY
Notary Public, Ramsey County, Minn.

My Commission expires May 20, 1941.

[Endorsed]: Filed June 18, 1940. C. R. Garlow,
Clerk. [38]

Thereafter, on July 22, 1940, Order for Bill of Particulars was duly filed and entered herein, being in the words and figures following, towit: [39]

[Title of District Court and Cause.]

ORDER

The defendants herein having moved the Court for an order requiring the plaintiff to make the allegations of paragraph XIII of the complaint more definite and certain by stating and setting out verbatim the particular part or parts of the plans and specifications for the electric plant or system described in the complaint, which were so prepared as to prevent competition in the bidding for the construction of said plant or system, and

plaintiff having confessed said motion, and the parties agreeing that plaintiff may have additional time, beyond the ten day period subsequent to notice fixed by Rule 12(e) :

It is ordered: that plaintiff prepare, serve and file herein statement for Bill of Particulars in response to said motion on or before Monday the 29th day of July, 1940.

Done and dated this 22nd day of July, 1940, nunc pro tunc as of June 28, 1940.

CHARLES N. PRAY

United States District Judge

[Endorsed]: Filed and entered July 22, 1940.
C. R. Garlow, Clerk. [40]

Thereafter, on July 27, 1940,

BILL OF PARTICULARS

was duly filed herein by the Plaintiff, being in the words and figures following, towit: [41]

[Title of District Court and Cause.]

The plaintiff for its Bill of Particulars herein, demanded by the defendants, sets forth and alleges as follows:

That the plans and specifications were, as alleged in paragraph XIII of the complaint, prepared by or under the direction or supervision of the defendant, Fairbanks, Morse & Co., and were so pre-

pared as to prevent any competition in the bidding for the construction of said plant or system.

That said specifications were so prepared, with the consent and approval of the said defendant city and its officials, and with the understanding between said defendants that no one but the defendant Fairbanks, Morse & Co. would bid for the furnishing of said plant or system, in violation of Section 5070 of the Revised Codes of Montana of 1935, as amended by Chapter 18 of the Laws of Montana of 1939.

That the parts of said specifications which were so prepared as to prevent competition in the bidding for the construction of said plant or system are as follows, to-wit:

“Three Diesel Engines shall be furnished under these specifications with an approximate capacity of 300 HP, 375 HP and 450 HP each, or as near to these standard ratings as the manufacturer’s standard ratings will allow. In no event shall the total plant horsepower be less than 1100 HP. Each unit shall be capable of carrying its full load continuously without undue stresses and strains. Each unit shall also be capable of delivering a 10% overload for a period of not less than two hours on test. Each engine shall be of the full Diesel type, operating at approximately 500 lbs. compression pressure. The M. E. P. shall not exceed 80 lbs. for the four cycle type and 60 lbs. for the two cycle type. Only engines of solid injection or mechan-

ical injection type [42] will be acceptable. The rotative speed shall not exceed 360 RPM and the piston speed shall be not more than 1100 feet per minute. Engines of slow rotative speed and low piston speed are desired.

It is the intent of these specifications to require a stationary type of engine of heavy duty design which will operate continuously at full load. The engines shall be so designed as to be of neat and rigid construction, fully enclosed with hand hole plates provided for easy access to the moving parts. With certain exceptions as herein specified, the detail of the engine design is left to the engine manufacturer. Bidders are, therefore, requested to submit with their bid descriptive literature showing the general construction of the unit bid upon.

The crankshaft shall be made from a single billet of open hearth steel with the usual heat treating. The shaft shall be of heavy design to provide a large factor of safety against any abnormal strain, and must have been ‘electric eye’ tested for flaws before being installed.

The engines to be furnished under these specifications shall be equipped with cylinders and pistons designed in accordance with the general practice of the trade. Only trunk type pistons, however, will be considered, and the pistons shall be designed with a large piston pin and sufficient piston rings to insure long wear and minimum blow-by.

Cylinders with or without cylinder liners will be acceptable. When cylinder liners are not used, the cylinder wall shall be of sufficient thickness to allow for at least two reborings.

When cylinder liners are used, the design of the cylinder shall be such that the liner can be conveniently removed and a satisfactory seal must be made between the cylinder liner and the cylinder to avoid leakage of water into the crankcase. Where cylinder liners are bid upon, the bidder shall submit with his bid sufficient detailed information so that the owner can determine in his own mind whether the seal is satisfactory.

The connecting rods shall be forged from a single solid billet of open hearth steel carefully machined and guaranteed to be in perfect alignment. The connecting rods shall be of such a design that the crank pin bearing is not integral with the connecting rod bearing.

The engine shall be provided with a complete fuel injection system of the mechanical or solid injection type. Differential type of injection nozzle must be furnished operating at an injection pressure of from 2,000 to 3,000# per square inch. Each engine shall be equipped with one spare injection nozzle. The injection system shall be complete with a nozzle testing jig, with pressure gauge, so that the nozzles can be tested in the field. The injection nozzles must be water-cooled so that proper operation can be assured.

The flywheel to be furnished with the engine shall be of sufficient size and weight to insure smooth operation of the engine under varying loads.

The engine shall be furnished with a Woodward isochronous governor of the most modern design. The governor shall be furnished with remote control for mounting on the switchboard so that the speed of the engine can be changed from the switchboard when paralleling the engine.

The cooling system to be furnished under these specifications shall be a complete dual system which shall circulate soft water thru the jackets of the Diesel engine, which in turn will be cooled by a heat exchanger. The raw water system shall consist of passing the raw water thru the heat exchanger and cooling by the cooling tower. The system shall be furnished complete with the necessary pumps, heat exchanger, cooling tower, pipes, valves, fittings, gauges and surge tank, as hereinafter specified.

[43]

Three motor driven centrifugal circulating pumps shall be furnished, one to be used for raw water, one for soft water and one as a spare. The pumps shall be of the horizontally split case type with direct connected motor and mounted on a common sub-base, and shall have a capacity of not less than 300 GPM against a head sufficiently high to pass the required

amount of water (300 gpm) thru the respective cooling system. The successful contractor shall be required to determine the proper size of motor to be installed on the pumps so that they will deliver the rated capacity against the head to be created in the system without overloading the motor.

The contractor will be responsible for supplying pumping units which will supply ample cooling under maximum load conditions.

Each motor shall be furnished with an across-the-line starter with push button control. The motor shall be designed for 220 volts, 3 phase service and of the standard squirrel cage type.

Two heat exchangers shall be furnished under these specifications. They shall be of the shell and tube type as similar to the Schutte-Koerting or Griscolm-Russell or approved equal.

Each heat exchanger shall be of a capacity to handle the cooling water for a 500 HP. These ratings shall be based on the soft water entering the heat exchanger at a temperature of approximately 140 degrees F. and discharging from the heat exchanger at a temperature of not greater than 125 degrees F. with a circulation of 300 gpm and with raw water entering the heat exchanger at a temperature of not more than 103 degrees F. and discharging from the heat exchanger at a temperature of approximately 118 degrees F.

The Contractor shall furnish and install four heat units at the location shown on the drawing. The one in the office shall be Modine No. 73-W, the three in the power room shall be Modine 399-W, or approved equal. Each unit shall be equipped with a three way switch, and shall be properly piped and valved to the cooling system in such a manner and using pipe sizes that they will operate satisfactorily.

There shall be furnished under these specifications a surge tank having a capacity of not less than 200 gallons, which shall be built of not less than No. 10 gauge steel. This surge tank shall be properly located in the power house building and equipped with a gauge glass so that the water level in the tank can be conveniently observed. The surge tank shall be connected to the cooling system as shown in the drawings.

An atmospheric type cooling tower shall be furnished under these specifications. The tower shall have sufficient capacity to cool the equivalent of 750 HP under the conditions set out in the paragraphs covering cooling system, circulating pumps and heat exchanger.

The successful contractor will be required to furnish a cooling tower which will operate satisfactorily under these conditions and he shall be required to submit complete information to the engineers for approval before the cooling

tower is shipped. The cooling tower shall be of the type similar to that furnished by the Marley Company or approved equal.

The contractor shall furnish and install a water softender capable of delivering not less than 75 GPH of softened water, Red Jacket Model #S36B, or approved equal. The softener shall have sufficient softening capacity so that operating with the equipment bid upon and using city water, it will not have to be regenerated more than once during 24 hours while furnishing the necessary make-up water. Rinse water disposal shall be to the City water plant filter waste line.

Indicating and alarm gauges shall be furnished for the cooling system as covered by the specifications covering gauge panel.

The Diesel engines shall be designed for starting with compressed air using an air pressure of not more than 250# per square inch. [44]

The work to be done under these specifications shall include the furnishing and installation of the complete air starting equipment as required. The air starting equipment shall consist of one motor driven air compressor operating at a maximum pressure of 250# per square inch and with a capacity of not less than 20 cubic feet of free air per minute.

This compressor shall be V-belt driven by a three phase, 60 cycle, 220 volt motor. The motor

shall be furnished complete with across-the-line starter and remote control, which will start the compressor when the pressure is lower than 200# per square inch and will shut the compressor off when the pressure exceeds 250# per square inch. There shall also be furnished a separate air compressor of the same specifications as above except that this compressor shall be driven with a gasoline engine. The size of the motor and gasoline engine shall be such that they will not be overloaded when the compressor is operating under its maximum condition. This gasoline engine driven compressor shall be properly cross-connected to the motor driven compressor lines.

The contractor under these specifications shall also furnish and install three air tanks of a size approximately 20x60" and built in accordance with specifications of the ASME. The air tanks shall be equipped with necessary pressure gauges, pop safety valve, globe valves and fittings.

Each engine shall be furnished with a cast-iron water cooled exhaust manifold. The contractor shall furnish all necessary exhaust equipment connecting from the exhaust manifold on the engine to the atmosphere in accordance with the drawings. The exhaust system generally shall consist of connecting from the water cooled exhaust manifold running directly

down to a point under the flow and then horizontally to a concrete exhaust chamber, which shall be built in accordance with the drawings and specifications under 'Building'. From here the exhaust gases shall be carried thru an exhaust silencer thru the exhaust stack to atmosphere.

The pipe connection between the manifold and the concrete exhaust chamber shall be of a size as recommended by the engine manufacturer and shall be built of not less than 1/4" steel and where buried under floor, shall be class 100 cast iron. This line shall have the necessary expansion joint in it to satisfactorily take care of expansion and contraction.

The concrete exhaust chamber shall be complete with necessary manhole and stack thimble.

There shall be furnished for each engine and mounted on the concrete exhaust chamber an exhaust silencer as manufactured by the Maxim Silencer Company or Burgess Battery Company or approved equal and shall have sufficient silencing ability to assure that the exhaust noises cannot be heard farther than 100' from the power plant.

The exhaust stack shall be placed on top of the exhaust silencer and shall be of the diameter recommended by the engine manufacturer. This stack shall be made of not less than 1/4" thick steel and shall be of such a length so that the exhaust will be emitted to the atmosphere

not less than 5' above the top of the power plant building.

The contractor shall furnish a pyrometer and necessary theremocouples so that the exhaust temperature of each individual cylinder can be determined conveniently. The pyrometer shall have sufficient points so that there will be one point for each cylinder and shall be of the type as manufactured by Alnor or Brown, or approved equal. The pyrometer shall be mounted on the gauge panel as covered by the specifications covering "gauge panel".

The contractor shall furnish and install a complete air intake system for each engine as shown on the drawings. The air intake system shall include the air filter house as shown on the drawing air filter and interconnecting pipe.

The air filters shall be of the type as manufactured by the American Air Filter Company, Model 20Z01 and 24Z01, Cy coil, or approved equal. They shall be furnished complete with one spare cell for each engine and a washing and charging tank together with ten gallons of charging fluid. [45]

The contractor shall furnish and install a pipe of the proper size as recommended by the engine manufacturer connecting the engine to the air filter house. This pipe shall be made of not less than 1/4" thick steel and where buried under floor, shall be class 100 cast iron, and

shall be furnished with the necessary expansion joints.

The air filter house shall be furnished complete with air filter unit frames, louvers and manhole. The contractor shall guarantee that the air intake noise shall not be heard at a distance of more than 150' from the power plant, and if a silencer is required for this purpose, it shall be furnished by this contractor.

A lubricating oil system shall be furnished complete by this contractor including dirty oil storage tank, clean oil storage tank, lubricating oil purifier and such other equipment as is necessary for the type of engine bid upon.

The clean and dirty lubricating oil tanks shall have a capacity of not less than 200 gallons each and shall be made of not less than No/10 gauge steel. The tanks shall be furnished with a gauge glass so that the level of oil in each tank can be readily determined.

The tanks shall be mounted in an angle iron frame in the position shown on the drawing with the dirty oil tank located directly above the clean oil tank.

This contractor shall furnish and install a lubricating oil purifier similar to that manufactured by the Hilliard Corporation and shall have a capacity of not less than 10 gallons per batch. The purifier shall be equipped with the necessary electrical heating elements and shall

be furnished with complete supplies to last for not less than 30 days.

There shall be furnished under these specifications complete fuel oil system including the storage tank, day tanks, piping, transfer pumps and fuel oil meters.

The contractor shall furnish and install a 20,000 gallon fuel oil storage tank. The tank shall be arranged for vertical installation and shall have approximate dimensions of 11' x 30'. It shall be made of not less than 1/4" bottom, 3/16" shell and No. 12 gauge cover. The tank shall be installed on a footing as shown on the drawing and shall be located as directed by the engineer.

Bearing surfaces of concrete, wherever in contact with the steel shall be coated with at least 1/4" of bituminous compound, Inertol Hot-mastic, or approved equal.

The day tanks, which it is contemplated to bury underground, must be given at least three coats of Inertol Standard Black or approved equal, and care used to install the tanks without injuring the coating.

The contractor shall furnish a day tank for each engine, each with a capacity of not less than 300 gallons. The day tank shall be installed as shown on the drawings.

The contractor shall furnish and install a fuel oil meter, Trident, Hersey, or approved

equal, for metering the fuel oil from the tank car to the storage tank. The contractor shall also furnish a meter for each day tank which will record the amount of oil delivered from the storage tank to each day tank. The master meter shall be of such size that it will have a capacity of not less than 35 gpm and the day tank meters shall have a capacity of not less than 15 gpm. The fuel meters shall be located so as to be easily accessible for readings. The dials shall be direct reading and shall indicate gallons. They shall measure with an accuracy within 1% plus or minus, the minimum and maximum flows under any operating conditions. Master meter must be equipped with a separate strainer, with perforated plate and 40 mesh screen readily accessible for cleaning. [46]

The contractor shall have included in his bid the furnishing and installing 1,500' of 2" fuel oil pipe line which shall extend from the fuel storage tank to the railroad siding. This pipe shall be installed as directed by the engineer. The bidder shall determine before submitting bid the approximate location of his pipe line and shall bid accordingly. The bidder shall also include in his proposal an alternate to be added or deducted per foot if the line shall be more or less than 1,500' in length. He shall also furnish not less than 15' of 2" flexible hose line designed to handle fuel oil, and furnish and in-

stall all necessary piping and connections to the fuel oil storage tank, and for attachment to tank cars. Piping arrangements must also be made to receive fuel oil from trucks.

The fuel oil line shall be of 2" genuine galvanized iron pipe and shall be installed not less than 20" below the ground level.

The contractor shall furnish and install 2 fuel oil transfer pumps, which shall be motor driven. The transfer pump shall be either a centrifugal or rotary as the contractor recommends and shall have a capacity of not less than 1500 gallons per hour. The motor shall be of sufficient size to not be overloaded under the anticipated pumping head and shall be furnished with an across-the-line starter with push button control, complete with necessary wiring.

It is expected that the Diesel engine will be furnished with a built-in fuel pump for transferring the oil from the day tank to the engine. Otherwise, a separate fuel transfer pump must be furnished by the contractor.

Each fuel day tank shall be equipped with a gauge so that the level in the tank can be determined from the engine room. The gauge shall be mounted on the wall as directed by the engineer and shall be similar to a levelometer.

The fuel oil storage tank shall be equipped with a Viking or equal level indicator, with the indicator mounted on the gauge panel or on the wall as directed by the Engineer.

The contractor shall furnish and install the complete piping for the entire power plant, which shall include the cooling system, fuel oil system, lubricating oil system, air start system, necessary pressure and temperature gauges, etc., together with connections to the city water supply and the sewer. The contractor shall determine from the engineer the best location for connecting to the city water supply and to the city sewer.

All piping 4" and larger shall be flanged and smaller than 4" may be screwed. All piping shall be installed in the pipe trench as shown where possible, otherwise it shall be installed under the floor. All piping installed under the floor shall be cast iron, where not in accessible pipe trench or tunnel. All valves shall be Crane or approved equal.

The piping system shall be furnished complete with all necessary hangers, anchors and supports and shall be complete with sufficient unions to conveniently allow dismantling. It is the intention of these drawings to show a standard piping layout, but the contractor will be required to furnish the complete piping system as required for the engine bid upon.

The contractor shall furnish a chain hoist and trolley for each engine, which shall be placed on the "I" beam above the engine as shown on the drawing. The chain hoist shall be

similar to the tri-bloc as manufactured by the Ford Chain Block Co., or the Cyclone as manufactured by the Chisholm-Moore Hoist Company or approved equal. The trolleys shall be a plain type trolley as manufactured by these companies and shall be of ample capacity to handle with ease the load to be imposed upon them.

The contractor shall furnish and install a gauge panel as directed by the engineer. The panel shall be of stretcher level steel to match the panels specified in these specifications under "switchboard". The panels shall not be less than 76" high, 30" wide and mounted on a frame to be self-supporting. [47]

On this panel shall be mounted the following instruments:

Raw water pressure gauge—electric alarm
Soft water pressure gauge—electric alarm
Surge tank pressure gauge—electric alarm
Soft water temperature gauge—electric alarm
Lubricating oil pressure gauge—electric alarm
alarm (to be furnished if engine requires
pressure lubrication.)

Pyrometer—(as specified under paragraph
entitled "exhaust".)

Starting air pressure gauge

Fuel Oil pressure gauge

Jacket water gauge, Temperature indicating

Lubricating oil gauge, Temperature indicating

All of the above gauges shall be of a diameter of not less than 6" and shall be furnished with a cromium flared ring. They shall be similar to those furnished by the Marshalltown Manufacturing Company.

The gauge panel shall be furnished complete with the necessary relays, a Klaxen horn, and all necessary back of board wiring so connected that the electric alarm gauges will sound the Klaxen horn on both high and low limits.

Certain of the above instruments may be mounted on an individual gauge panel for each engine, if equipment offered requires such installation.

There shall be furnished and installed a tool and work bench, with drawers and two shelves for storing tools and supplies, a circuit with switches, etc., for proper meter testing, and a full supply of all special tools needed or convenient for any of the equipment.

Contractor shall connect the existing water plant mixing chamber overflow line to the existing filter waste line, under the floor of the power plant building. This will require two 8" short-sweep cast iron ells, a "cut-in" 12"x8" tee, and 28' of 8" class 100 cast iron pipe.

Rinse water from the water softener and overflow water from the surge tank, may be discharged to this line. All other drainage, sewerage and other waste water, must be disposed of to the City sanitary sewer.

The contractor shall furnish and install 2-2qt. and 1-1qt., fire extinguishers, Fyr-Fyter or approved equal.

All steel floor plates shall be equipped with Tapax or approved equal gaskets under all bearing edges.

Each Diesel engine shall be furnished with a direct connected engine type alternator of a size to deliver the complete capacity of the engine with which it will be mounted. The exact size of the alternator will depend upon the size of the engine offered, and shall be approximately of the following sizes, depending upon the standard sizes of the engines offered:

Unit No. 1—300 HP—200 KW

Unit No. 2—375 HP—250 KW

Unit No. 3—450 HP—300 KW

In no event shall the total kilowatt capacity of the plant be less than 750 kilowatts.

The alternators shall be designed to operate at 2400 volts, 3 phase, and 80% power factor. They shall be designed to deliver 60 cycle current when operating at the engine speed and shall be constructed in accordance with the AIEE specifications.

If the generator is furnished by other than the engine manufacturer, [48] the generator manufacturer must co-operate with the engine manufacturer in order to insure the proper mounting of the alternator on the engine manu-

facturer's extension shaft. The engine manufacturer shall be entirely responsible for the satisfactory operation of the alternator and exciter regardless of the manufacturer. The alternator shall be designed to operate in parallel.

The contractor shall furnish an exciter for each generating unit of ample capacity to easily excite the alternator field under all possible operating conditions. It is expected that at normal operating conditions the power factor will not be less than 60%. Under these conditions the excited must be able to handle full load KVA rating of the alternator. The exciter shall be driven from the engine extension shaft by a V-belt or silent chain drive of ample capacity to insure long life. The exciter shall operate at a speed of not more than 1750 rpm and shall be rated at a normal voltage of 125 volts.

The contractor shall furnish a concentric rheostat for each unit, one for the alternator and one for the exciter. These rheostats shall be mounted on the switchboard by the contractor.

The contractor shall guarantee to the owner that the three generating units to be furnished under these specifications will satisfactorily parallel.

The alternator and exciter construction shall be in accordance with the best practice known

to the trade pertaining to the respective parts of the equipment. The construction shall be such that the alternator shall be free of excessive noises."

That it was known to said defendants at the time of and prior to the advertisement for bids that the defendant Fairbanks, Morse & Co. is the only concern that manufactures, or is prepared to manufacture or produce, the type of Diesel engine, with the equipment, provided for in said specifications. That there are other manufacturing establishments and concerns manufacturing and producing Diesel engines, with power efficiency and cost of operation, equal to the Diesel engines specified.

Dated July 26th, 1940.

TOOMEY, McFARLAND & CHAPMAN
GUNN, RASCH, HALL & GUNN

By M. S. GUNN

A member of said Firm.

Residence and Post Office Address:
Helena, Montana.

Attorneys for Plaintiff.

[Endorsed]: Filed July 27, 1940. C. R. Garlow,
Clerk. [49]

Thereafter, on June 25, 1940, a Stipulation was filed herein, being in the words and figures following, to wit: [50]

[Title of District Court and Cause.]

STIPULATION

Whereas, the plaintiff has made an application for a preliminary injunction herein:

Now, therefore, it is hereby stipulated that the defendant, the City of Forsyth, will not, pending the final decision of this case on the merits, remove any of the poles or wires of plaintiff from the streets and alleys of said city, or in any manner interfere with the electric plant or system of plaintiff, or the operation of same, and it is further stipulated that the defendant, Fairbanks, Morse & Co., will refrain, pending the final decision of this case on the merits, from constructing the proposed electric plant or system for said City, or any part thereof, and that an order may be made and entered herein accordingly.

Dated this 19th day of June, 1940.

TOOMEY, McFARLAND & CHAPMAN
GUNN, RASCH, HALL & GUNN

By M. S. GUNN

A Member of said Firm.

Residence and Post Office Address:
Helena, Montana.

Attorneys for Plaintiff.

F. F. HAYNES

Residence and Post Office Address:
Forsyth, Montana.

KYLE & KYLE

St. Paul, Minnesota

Attorneys for Defendants.

[Endorsed]: Filed June 25, 1940. C. R. Garlow,
Clerk. [51]

Thereafter, on July 22, 1940, Order Pursuant to Stipulation was duly filed and entered herein, being in the words and figures following, to wit: [52]

[Title of District Court and Cause.]

ORDER

Whereas, a stipulation has been entered into and filed by the parties hereto wherein and whereby it is stipulated that the defendant, the City of Forsyth, will not, pending the final decision of this case on the merits, remove any of the poles or wires of plaintiff from the streets and alleys of said city, or in any manner interfere with the electric plant or system of plaintiff, or the operation of same, and it is further stipulated that the defendant, Fairbanks, Morse & Co., will refrain, pending the final decision of this case on the merits, from constructing the proposed electric plant or system for said City, or any part thereof, and that an order may be made and entered herein accordingly.

Now, therefore, it is ordered that the defendants and each of them observe and abide by the provisions of said stipulation, and are hereby enjoined and restrained accordingly.

Dated this 22 day of July, 1940.

CHARLES N. PRAY
Judge

[Endorsed]: Filed and entered July 22, 1940.
C. R. Garlow, Clerk. [53]

Thereafter, on December 18, 1940, a Motion, and Notice Thereof, for Judgment on the Pleadings was duly filed herein, being in the words and figures following, to wit: [54]

[Title of District Court and Cause.]

MOTION

The plaintiff moves the Court for judgment in its favor on the pleadings because the answer fails to state any defense in law or in fact to the cause of action stated in the complaint.

GUNN, RASCH, HALL & GUNN
E. G. TOOMEY

Address: Helena, Montana
Attorneys for Plaintiff

To F. F. Haynes and Kyle & Kyle, Attorneys for Defendants:

Please take notice that the undersigned will bring the above motion on for hearing before the Court in the Court Room, in the Federal Building, in Billings, Montana, where the above-entitled Court is held, at 10:00 o'clock in the forenoon of the day when said Court next convenes in Billings, or as soon thereafter as a hearing can be had.

GUNN, RASCH, HALL & GUNN
E. G. TOOMEY
Address: Helena, Montana
Attorneys for Plaintiff

[Endorsed]: Filed Dec. 18, 1940. C. R. Garlow,
Clerk. [55]

Thereafter, on July 16, 1941,

DECISION OF THE COURT

was duly filed herein, being in the words and figures following, to wit: [60]

[Title of District Court and Cause.]

The questions presented here arise over a motion by plaintiff for a judgment on the pleadings in its favor for the reason that the answer filed herein "fails to state any defense in law or in fact to the cause of action stated in the complaint."

By this action plaintiff seeks an injunction to enjoin the defendant City of Forsyth, Montana, from entering into a contract with the defendant Fair-
banks, Morse & Company, for the construction of
a municipal electric lighting, heating and power plant, or, if said contract has been entered into, enjoining the defendant last named from constructing such plant.

From the complaint it appears that plaintiff is, and has been for several years, the owner of an electric light and power plant or system in said city, consisting in part of poles and wires in the streets and alleys of said city, and engaged in furnishing electric light and power to said city and the inhabitants thereof at rates prescribed by the Public Service Commission of Montana; that said plant or system was constructed by the predecessor in interest and ownership of the plaintiff. That the city authorities proposed to construct a municipal

electric light, heat and power plant, and for that purpose entered into a contract with the defendant construction company for furnishing and constructing such a plant in and for said city, for the sum of \$169,969.00, payable in monthly installments, with interest at the rate of 5 per cent per annum, solely out of the net earnings of said plant, in accordance with the plans and specifications and bid of said defendant construction company. That an election was held for the approval of the tax-paying electors of said city, and that the proposed contract at such election [61] was approved by a majority vote. The complaint alleges, in paragraph VIII, that the city under said contract is assuming to exercise power and authority conferred by Chapter 115 of the Laws of Montana of 1937, as amended by Chapter 111 of the Laws of Montana of 1939. The answer alleges that the city in entering into said contract is proceeding under authority conferred upon it by the decisions of the Supreme Court and statutes of Montana, including the statutes referred to in paragraph VIII of the complaint. The answer further alleges that the present plant was constructed and first operated pursuant to a franchise granted by the city, but that such franchise has expired, and that plaintiff is now occupying the streets and alleys solely during the will and pleasure of the city.

The jurisdictional amount alleged in the complaint is denied in the answer, but the admission further appears in the answer of the amount in-

volved in the construction of the municipal electric plant and, according to the authorities cited, that is sufficient to determine the question of jurisdiction, which seems to be the value of the object sought to be attained in this litigation. Without discussing the question minutely as set forth in the voluminous briefs of counsel, it seems quite clear that plaintiff has a franchise (Sec. 6645, R. C. M. 1935), although one that is not exclusive, and, as contended by defendants, one that could not prevent the city from constructing its own plant and operating in competition with plaintiff, to which the rule of "damnum absque injuria" might apply. But plaintiff contends that if the City is without authority to make such a contract then the injunctive relief sought should be granted irrespective of the fact that its franchise is not exclusive, so that the decision here seems to rest upon the authority of the city to act in the manner contemplated by its contract, in other words, whether it has entered into a valid contract with the construction company, although authorized by a majority of the tax-paying voters so to do.

It was held that the holder of a franchise to operate an electric light plant, although not exclusive, would be protected against the [62] illegal acts of others attempting to exercise the same privilege conferred by the franchise, and against illegal competition. (*Arkansas-Missouri Power Co. v. City of Kennett*, 78 Fed. (2) 911; *Frost v. Corporation Commission*, 278 U. S. 515; *City of Campbell v.*

Arkansas-Mo. Power Co., 55 Fed. (2) 560.) Is it a legal and binding contract. Section 5039.63, in so far as applicable here, reads as follows: "The city or town council has power: To contract an indebtedness on behalf of a city or town, upon the credit thereof, by borrowing money or issuing bonds for the following purposes, to wit: * * * Erection of * * * lighting plants."

Defendants contend that borrowing money or issuing bonds, as provided by the statute, is permissive only and does not prohibit the city from entering into the contract under consideration; opposed to this view is the contention of plaintiff that where a statute authorizes a city to acquire a lighting plant, upon the credit of the city, by borrowing of money or issuing of bonds, such method is exclusive, and this latter contention would seem to be sustained by the greater weight of authority as will appear from an examination of the authorities cited by counsel for both sides, and also by the recent well reasoned case of Whipps, Sr., v. The Town of Greybull, Wyoming, decided by the Supreme Court of Wyoming February 4th, 1941. Where the statute prescribes the mode of exercising the power it must be pursued in all substantial particulars. (Shapard v. City of Missoula, 49 Mont. 269.)

The court has considered the supplemental brief of plaintiff in which it contends that the contract in question is also unenforceable and invalid because of want of mutuality. The contract provides that:

"The contractor will not be required to begin work until ten days after litigation for the ousting of the power company now serving the city from its streets has been finally determined in favor of the city." In another paragraph of the contract the city promises promptly to institute legal action to have it determined that the plaintiff has no right to use or occupy the streets, alleys or public grounds of the city with poles, wires or other instrumentalities, and that it be required to remove all its equipment therefrom. If the [63] court is correct in holding that plaintiff has a franchise then the contractor would not be obliged to construct the plant since the plaintiff could not be ousted as promised by the city in the contract. If the contract is invalid then a new contract could not be made with this or any other contractor by the defendant city for the construction of the plant since it appears that the statute under which it claimed authority to act expired March 15th, 1941. (Chap. 115 Laws of 1937; Chapter 111 Laws of 1939.) It is quite evident from the terms of the contract that authority was not given the city by the voters to construct and operate a plant in competition with plaintiff, but upon the assurance, to be strongly inferred from the language of the contract, that plaintiff would be ousted from the city and required to remove all its equipment.

The contractor does not have to begin work until ten days after the final determination of the court that plaintiff is to be ousted. Such a contract would

seem to come within the rule relied upon by plaintiff's counsel. Mutuality of obligation is an essential element of every enforceable contract. Mutuality is absent when one only of the contracting parties is bound to perform, and the rights of the parties exist at the option of one only. (13 C. J. 331). Each party must have the right at once to hold the other to a positive agreement. Counsel cited a decision by Judge Hunt in *Pocatello v. Fidelity & Deposit Co.*, 267 Fed. 161, C. C. A. 9, which appears to be precisely in point.

In discussing the effect of the repeal of a statute reference was made to 59 C. J. pgs. 1185 and 1187, which provides in part that "the repeal of a statute does not operate to impair or otherwise affect rights that have been vested or accrued while the statute was in force. This rule is applicable alike to rights acquired under contracts and to rights of action to recover damages for torts."

Aside from the lack of authority to enter into such a contract on the part of the city, it would now appear from the argument of counsel for plaintiff, to which there has been no reply, that the [64] contract itself is invalid and unenforceable, thereby claiming an additional reason why plaintiff should prevail. Counsel for defendants have presented an able discussion of the problems involved, which in some respects are difficult of solution, but if the court is in error, it is not one that can not be speedily corrected.

As may be inferred from the foregoing views the Court was not impressed with the argument of counsel declaring Chapter III of the laws of 1939 unconstitutional, but on the other hand it may also be inferred that the court does not believe that this Chapter has any application to the present controversy, or the material questions here raised, nor does it supercede or modify in any respect the plain and specific mandatory provisions of Section 5039. 63 R. C. M.

Wherefore, being duly advised and good cause appearing therefor, in the opinion of the court the plaintiff should prevail in its motion, and it is so ordered.

CHARLES N. PRAY
Judge

[Endorsed]: Filed July 16, 1941. C. R. Garlow,
Clerk. [65]

Thereafter, on July 21, 1941, Judgment was duly entered herein, being in the words and figures following, to wit. [66]

In the District Court of the United States for the
District of Montana, Billings Division

MOUNTAIN STATES POWER COMPANY,
Plaintiff,

vs.

CITY OF FORSYTH, and FAIRBANKS,
MORSE & CO.,
Defendants.

JUDGMENT

This cause came on to be heard upon the plaintiff's motion for judgment on the pleadings in its favor and was argued by the attorneys for the respective parties; and thereupon, after due consideration thereof, it was ordered, adjudged and decreed, as follows, namely:

1. That the said motion of plaintiff for judgment on the pleadings in its favor be and the same is hereby sustained.
2. That the preliminary injunction issued pursuant to stipulation of the parties be made permanent, and the defendants be and they are hereby enjoined from removing any of the poles or wires of plaintiff's electric plant or system in the City of Forsyth, Montana, from the streets and alleys of said City of Forsyth, or from in any manner interfering with said plant or system, or the operation of the same, and that the defendant, Fairbanks, Morse & Co., is hereby enjoined from constructing

an electric light, heat and power plant within said City for the reasons:

- (a) That the plaintiff has a valid and existing franchise for the maintenance and operation of its electric plant and system in said City.
- (b) That the contract between the said City and the defendant Fairbanks, Morse & Co., for the construction of a municipal light, heat and power plant, is invalid.
- (c) That the construction and operation of such a municipal plant, according to the terms and provisions of said contract, would constitute illegal competition with plaintiff's electric plant and system. [67]

3. That the plaintiff recover its costs herein taxed herein taxed at the sum of \$10.00.

Dated this 21st day of July, 1941.

CHARLES N. PRAY

Judge

[Endorsed]: Filed and entered July 21, 1941.
C. R. Garlow, Clerk. [68]

Thereafter, on October 7, 1941,

NOTICE OF APPEAL

was duly filed herein, in the words and figures following, to wit: [69]

[Title of District Court and Cause.]

Notice is hereby given that the City of Forsyth and Fairbanks, Morse & Company, defendants in

the above entitled action, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in the above action on the 21st day of July, 1941, and from the whole of said judgment.

Dated this 30th day of September, 1941.

H. V. BEEMAN

Attorneys for city of Forsyth,
Montana

Residence & Address: Forsyth,
Mont.

KYLE & KYLE

Attorneys for Fairbanks,
Morse & Co.

By JOHN P. KYLE

One of said Attorneys

Residence: St. Paul, Minnesota

Address: 618 Guardian Building,
St. Paul, Minnesota

[Endorsed]: Filed October 7, 1941. C. R. Garlow,
Clerk. [70]

CLERK'S CERTIFICATE TO TRANSCRIPT
ON APPEAL

United States of America,
District of Montana—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to The Honorable, The United

States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 87 pages, numbered consecutively from 1 to 87 inclusive, constitutes a full, true and correct transcript of all portions of the record in case Number 183, Mountain States Power Company, Plaintiff, vs. City of Forsyth, and Fairbanks, Morse & Co., Defendants, designated by the parties as the record on appeal therein, as appears from the original records and files of said court in my custody as such Clerk.

I further certify that the costs of said transcript amount to the sum of Eighteen and 55/100 Dollars (\$18.55) and have been paid by the appellants.

Witness my hand and the seal of said court at Great Falls, Montana, this 26th day of November,
A. D. 1941.

(Seal)

C. R. GARLOW,

Clerk U. S. District Court,
District of Montana,

By C. G. KEGEL,

Deputy. [87]

[Endorsed]: No. 9990. United States Circuit Court of Appeals for the Ninth Circuit. The City of Forsyth, a municipal corporation of The State of Montana and Fairbanks, Morse & Company, a corporation, Appellants, vs. Mountain States Power Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana, Billings Division.

Filed December 5, 1941.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 9990

CITY OF FORSYTH and FAIRBANKS,
MORSE AND COMPANY,

Appellants,

vs.

MOUNTAIN STATES POWER COMPANY,
Appellee.

STATEMENT OF POINTS AND DESIGNA-
TION OF PARTS OF RECORD TO BE
PRINTED

I.

STATEMENT OF POINTS

The following is a statement of the points upon which Appellants intend to rely on this appeal:

(1) It appears upon the face of the pleadings that the District Court had no jurisdiction of the action, because:

(a) The allegation in the complaint that the amount in controversy exceeds Three Thousand dollars exclusive of costs is denied by the answer.

(b) The amount in controversy in this action is not the amount of the contract between the city of Forsyth and Fairbanks, Morse & Company, namely, \$169,960.00, for the *the* construction of the municipal light plant.

(c) The amount in controversy in this case is not the right of the city of Forsyth to construct a

municipal electric plant at a cost of \$169,960.00, and even if it were, the value of such right to the city is not alleged. The value is not the cost of installation, because that is a disbursement.

(d) The amount in controversy in this case is not the value of the privilege of constructing the municipal light plant of which Fairbanks, Morse & Company will be deprived, nor is the value of such privilege alleged. The cost of construction is not the value of such privilege.

(e) The pleadings do not show, nor is it claimed, that the Appellee has an exclusive franchise in the city of Forsyth, and therefore the establishment of a municipal light and power plant by said city is as to the Appellee *damnum absque injuria*.

(2) The Appellee has no standing in Court to maintain this action in its personal capacity.

(3) The Appellee has no standing as a taxpayer to maintain this action, because:

(a) The action is not brought in a representative capacity as a taxpayer, for the benefit of all taxpayers.

(b) There is no allegation in the complaint that the Appellee is damaged as a taxpayer to any amount whatsoever.

(c) The contract entered into between the city of Forsyth and Fairbanks, Morse & Company is not payable out of taxation, but solely out of the earnings of the municipal light and power plant to be established, and therefore no taxpayer is damaged.

(4) The Appellee has not, nor had it at the time of the commencement of this action, any franchise to maintain or operate a light and power plant in the city of Forsyth, and the Appellee was at the time of the commencement of this action and now is, occupying the streets of said city on sufferance.

(5) Section 6645 of the General Statutes of Montana for 1935 does not confer upon the plaintiff an exclusive franchise, or a perpetual franchise.

(6) Chapter 115 of the Session Laws of the State of Montana for the year 1937 is not unconstitutional.

(7) Chapter 111 of the Session Laws of the State of Montana for the year 1939 is not unconstitutional.

(8) This action cannot be brought or maintained in a dual capacity, that is to say, to vindicate the private rights of the plaintiff, and to vindicate the public rights of taxpayers, and an action for both purposes cannot be joined.

(9) The complaint is not susceptible of amendment to give the Federal District Court jurisdiction because the Appellee is not legally damaged by the installation and consequent competition of the municipal light and power plant by the city of Forsyth.

(10) The city of Forsyth has authority to establish and maintain a municipal light, heat and power plant under the statutes and decisions of the State of Montana.

(11) The city of Forsyth has authority to make

a contract for the installation and construction of a municipal light and power plant which is payable out of the earnings of the plant itself, and which imposes no general obligation on the city.

II.

DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED

The Appellants hereby designate the following parts of the record as the parts thereof to be printed as necessary for the consideration of the points of the Appellants above specified:

1. The Complaint, designated as such in the certified transcript of the record herein, consisting of seven pages, and a fraction, together with exhibits A and B attached thereto.
2. The Answer of the defendant, city of Forsyth, designated as such in the transcript of the record, consisting of three pages, together with Exhibit A attached thereto.
3. The plaintiff's motion for judgment on the pleadings and the Notice for Hearing thereon, designated as "Motion" upon the certified transcript of the record herein.
4. The decision of the trial Court by Charles N. Pray, Judge, bearing date July 16, 1941, designated as 183 Civil, consisting of four pages, and a fractional part of a page, and winding up with an order granting the motion.
5. The judgment entered in said action, bearing date the 21st day of July, 1941, consisting of one

page and a fractional part of a page, and designated as "Judgment."

6. The Notice of Appeal, consisting of one page, and designated as No. 183 Civil, said Notice bearing date the 30th day of September, 1941.

H. V. BEEMAN

Residence and Business Address:
Forsyth, Montana.

KYLE & KYLE

By JOHN P. KYLE

Residence: St. Paul, Minnesota.

Business Address: 614-618
Guardian Bldg., St. Paul,
Minn.

Attorneys for Appellants.

To Toomey, McFarland & Chapman, and Gunn,
Rasch & Gunn, Attorneys for Appellee:

You Are Hereby Notified That the foregoing are the statement of points of the Appellants which they intend to urge upon the Appellee in the above entitled action, and a designation of the parts of the record which they desire to have printed for the consideration of said points.

You are hereby notified to designate such other parts of the record as you may deem material or necessary for the consideration of said points.

Dated this 29th day of November, 1941.

H. V. BEEMAN

Residence and Post Office Ad-
dress: Forsyth, Montana.

KYLE & KYLE

By JOHN P. KYLE

Residence: St. Paul, Minne-
sota.

Business Address: 614-618
Guardian Bldg., St. Paul,
Minnesota.

Attorneys for Appellants.

State of Minnesota,
County of Ramsey—ss.

Esther P. McEvoy, being first duly sworn, on oath deposes, and says:

That heretofore, to-wit, on the first day of December, 1941, at the City of St. Paul, Minnesota, she served the attached Statement of Points, Designation of Parts of Record to be Printed, and Notice to Designate such additional parts of the record as the said attorneys may deem necessary on said appeal, upon the attorneys for the appellee by then and there depositing in the Post Office in the city of St. Paul, Minnesota, enclosed in a sealed envelope with postage thereon prepaid, a true and correct copy of said Statement of Points, Designation of Parts of Record to be Printed and Notice to Designate such additional parts of the record

as the said attorneys may deem necessary on said appeal, and addressed to said attorneys as follows:

"Toomey, McFarland & Chapman, and
Gunn, Rasch & Gunn,
Securities Building,
Helena, Montana."

That said attorneys are the attorneys of record for the said appellee and that their address is given as above stated.

ESTHER P. McEVOY

Subscribed and sworn to before me this first day of December, 1941.

(Seal) JOHN P. KYLE
Notary Public, Ramsey County, Minn.

My commission expires April 9, 1944.

[Endorsed]: Filed Dec. 5, 1941. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION BY APPELLEE OF PARTS
OF RECORD TO BE PRINTED

The Appellee hereby designates the following parts of the record as the parts thereof to be printed as necessary for the consideration by the Court of the statement of points upon which Appellants intend to rely, and complete consideration of the matters involved on the appeal, to-wit:

- (1) The Separate Answer of the Defendant (Appellant) Fairbanks, Morse and Company,

designated as such in the transcript of the record, together with all exhibits attached thereto.

(2) The Demand of the Defendants (Appellants) for a Bill of Particulars designated as such in the transcript of record.

(3) The Order of the Court requiring the furnishing of a Bill of Particulars, designated as such in the transcript of the record.

(4) The Bill of Particulars furnished by the Plaintiff (Appellee) to the Defendants (Appellants) designated as such in the transcript of the record.

(5) The Stipulation of Plaintiff (Appellee) and Defendants (Appellants) to refrain from removing poles, etc., pending final decision.

(6) The Order of the Court enjoining Defendants (Appellants) pending final decision from removing poles, etc., and from constructing the proposed electrical plant.

The Clerk of the United States District Court for the District of Montana (at Great Falls, Montana) advises the undersigned that the original certified record, forwarded by that Clerk to the Clerk of the Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, does not contain reference to the above papers and documents, by page number on said record, and there is no copy of the index on file in the office of the Clerk of the United States District Court for the

District of Montana at Great Falls, or at Helena,
Montana.

GUNN, RASCH & GUNN,
By M. S. GUNN

Helena, Montana
TOOMEY, McFARLAND &
CHAPMAN

By E. G. TOOMEY
Helena, Montana.
Attorneys for Appellee

To Messrs. Kyle & Kyle, 614-618 Guardian Building, St. Paul, Minnesota, and to H. V. Beeman, Esq., Attorney at Law, Forsyth, Montana, Attorneys for Appellants:

You are hereby notified that the foregoing constitutes the designation by the Appellee of the parts of the record which it desires to have printed, IN ADDITION to the parts of the record heretofore designated by Appellants to be printed.

Done and dated this 8th day of December, 1941.

GUNN, RASCH & GUNN,
By M. S. GUNN
Helena, Montana
TOOMEY, McFARLAND &
CHAPMAN
By E. G. TOOMEY
Helena, Montana

[Endorsed]: Filed Dec. 10, 1941. Paul P. O'Brien,
Clerk.

